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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

LT. JOHN A. STRAIT,

Petitioner,

—v.—

HON. MELVIN R. LAIRD, Secretary of Defense; HON. STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, Calif.; COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner JOHN A. STRAIT prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case having docket number 26289 in said court. The opinion of said court was filed on June 4, 1971.

Opinion Below

The opinion of the court below on rehearing, as yet unreported, is reproduced herein as Appendix A1. The opin-

ion filed February 17, 1971, but vacated by order of the Court on June 4, 1971, appears as Appendix A2.

Jurisdiction

The final opinion below was filed on June 4, 1971. The Court of Appeals had filed an opinion on February 17, 1971. However, on June 4, 1971, on respondents' petition for rehearing, the court vacated the opinion of February 17 and filed the opinion of June 4 in its place.

The judgment of the court below reversed the district court's order that it had jurisdiction under the Habeas Corpus Statute, 28 U.S.C. §2241, to review a denial of petitioner's request for discharge from the Army. The Court of Appeals directed the district court to dismiss the petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Did the district court have jurisdiction under the Habeas Corpus Statute, 28 U.S.C. 2241 et seq.?
2. Does the Mandamus and Venue Act of 1962 provide a method of reviewing, under the basis-in-fact test, military administrative determinations, and does the Court of Appeals' construction of the scope of review and extraordinary nature of the remedy created therein undermine the intent of Congress expressed in 28 U.S.C. §1361?
3. Did the district court have jurisdiction under other statutes providing for judicial review of federal administrative actions—*e.g.*, 5 U.S.C. §§701-703 and 28 U.S.C. §1331(a)?

Constitutional Statutory and Regulatory Provisions Involved

The full text of the constitutional, statutory, and regulatory provisions involved herein is set forth in Appendix B. The cited provisions are as follows:

Constitution of the United States:

Article I, Section 9 (Habeas Corpus)
Fifth Amendment (Due Process)

Title 5 United States Code:

§§701-703 (Supp. V, 1965-70)

Title 28 United States Code:

§1331(a) (1964)
§1361 (1964)
§1391(e) (1964)
§2241(a) and (b) (1964 and Supp. V, 1965-70)

Army Regulation 135-25 (Sept. 2, 1970)

Statement of the Case

A. *Nature of the Proceedings.*

This is an action seeking judicial review of an administrative decision of the Department of the Army denying petitioner's request for discharge as a conscientious objector. Petitioner appeals, pursuant to 28 U.S.C. §1254(1), from a judgment of the Court of Appeals for the Ninth Circuit remanding the proceedings to the district court with instructions to dismiss the action for lack of jurisdiction.

B. *Proceedings Below.*

The petitioner, LIEUTENANT JOHN A. STRAIT, [hereinafter LT. STRAIT] is an officer in the United States Army Reserve. On April 9, 1970, he filed an action in the District Court captioned PETITION FOR WRIT OF HABEAS CORPUS: FOR MANDAMUS: FOR DECLARATORY RELIEF AND MOTION FOR A TEMPORARY RESTRAINING ORDER (R 1).[1] In the petition LT. STRAIT requested the court to declare that he was entitled to be separated from the Army as a conscientious objector, to issue a writ of habeas corpus discharging him from the custody and control of the Army, and to restrain the Army from requiring him to report for active duty (R 11-12).

Pursuant to the latter prayer, the court issued an order to show cause on April 10, 1970, and ordered "that the petitioner remain within the jurisdiction of this Court, that he not be assigned duties inconsistent with the provisions of AR 135-25" (R 106). The order to show cause was returnable on April 24, 1970, but subsequently the matter was continued by stipulation to June 12, 1970. On the basis of documents which had come into his possession after he filed the original petition, LT. STRAIT filed an amended petition on May 11, 1970 (R 112-163).

On June 11, 1970, respondents filed a RETURN ON ORDER TO SHOW CAUSE AND MOTION TO DISMISS, alleging that the court lacked jurisdiction because LT. STRAIT was not assigned to a unit within the district (R 186). The motion to dismiss was argued on June 12, 1970, and on June 26, 1970, the court denied the motion in an opinion reported at 3 Selective Service Law Reporter (SSLR) 3158 (R 216).

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[1] All references are to the paginated Clerk's Record filed with the Court of Appeals. No reporter's transcript was prepared for the appeal, there having been no evidentiary hearing in the district court.

Thereafter on July 22, 1970, respondents filed another RETURN and ANSWER (R 218), and the matter was argued on the merits on July 24, 1970. On July 28, 1970, by minute order, the court "ORDERED AND ADJUDGED that the Petitioner's Application for Writ of Habeas Corpus, is denied" (R 233-A). LT. STRAIT then moved on July 31, 1970, for reconsideration and for findings of fact. Accordingly, further argument of counsel was heard on August 4, 1970, and on the same day the court ordered, again by minute order, that the motion for reconsideration be denied (R 251).

LT. STRAIT then appealed the denial of his petition to the Court of Appeals for the Ninth Circuit (R 245). Respondents filed a cross-appeal on the jurisdictional issue (R 255). The matter was then briefed and oral argument was held on September 11, 1970.[2] On February 17, 1971, the Court of Appeals entered a judgment and opinion affirming the district court's jurisdictional order but reversing its denial of relief on the merits (Appendix A-2). Respondents then moved for an extension of time to petition for rehearing, and they were allowed until April 2, 1971, to file such a petition. On March 23, 1971, the Supreme Court decided *Schlanger* v. *Seamans*, —— U.S. ——, 91 S.Ct. 995 (1971), and respondents petitioned for rehearing on the basis of *Schlanger*.

The Court of Appeals requested a response from LT. STRAIT, who argued that *Schlanger* was not applicable here-

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[2] The Court of Appeals declined to extend the district court's stay of LT. STRAIT's military activation, but Mr. Justice Douglas, acting as Circuit Justice, ordered such a stay pending appeal on August 16, 1970. LT. STRAIT has remained in inactive status pursuant to said order.

in. LT. STRAIT also briefly alluded to other jurisdictional statutes which had been pleaded in but not reached by the district court. He asked for an opportunity to further brief and argue those alternate theories if the court decided to apply *Schlanger*. On June 4, 1971, however, the court entered a new judgment and opinion ordering the action dismissed. No further briefing or argument was allowed, even though the court's opinion expressly or impliedly disposed of all jurisdictional issues.

C. *Statement of Facts.*

LT. STRAIT attended the University of California at Davis and was graduated in June 1966, whereupon he was commissioned as a second lieutenant in the United States Army Reserve, having completed the ROTC course as a Distinguished Military Graduate. He was then placed on a delayed reserve status in order to attend law school (R 2).

As a reserve officer with a delayed active duty obligation,[3] LT. STRAIT was not required to attend reserve drills or summer encampments. Rather his military records were maintained at the United States Army Reserve Components Personnel Center [hereinafter RCPC] located at Ft. Benjamin Harrison, Indiana (R 2). During the period between his commissioning (June 1966) and the commencement of this action (April 1970), LT. STRAIT attended the Yale Law School in New Haven, Connecticut (1966-69), and then returned to his home in San Francisco in order to take

[3] In this category are included all ROTC graduates who are deferred for graduate study and other purposes, medical school graduates who are enlisted under the "Berry Plan" (whereby they undertake a civilian internship and residency at their own expense), as well as all inactive duty reserve officers who have completed their "active" reserve obligation. Petitioner believes that these officers number in the thousands.

the California Bar Examination and to begin working as a law clerk with the San Francisco Neighborhood Legal Assistance Foundation (R 2, 15).

Throughout the entire period of his contacts with the Army, LT. STRAIT's permanent residence was that of his parents in San Francisco, California (within the jurisdiction of the Northern District of California), where he physically resided when not attending school (R 113). Moreover, all of his official, physical contacts with the Army have taken place at Army installations located within the Northern District of California, including those contacts (*i.e.*, interviews and hearings) related to his request for discharge (R 15). LT. STRAIT has *never* been in Indianapolis, Indiana, *nor has he ever* been officially on any Army installation other than those located within the Northern District of California.

Upon graduation from law school and after being permitted to take the bar examination, LT. STRAIT was ordered to report to Fort Gordon, Georgia, on April 16, 1970, to commence two years' active duty as an Army officer (R 103). During his second year of law school, however, LT. STRAIT began to have misgivings about his acceptance of a commission and his participation in the Army. He continued to struggle with the growing conflict within himself between duty to country and duty to conscience until November 1969, when a traumatic event occurred in his life. At that time he learned of the suicide of a close cousin, who was also a conscientious objector. The shock of learning of his cousin's death caused LT. STRAIT's qualms about military service to crystallize or become fixed into a full-blown conscientious objection to war (R 4).

As a result, he immediately began to prepare an application for discharge and to gather together the supporting

letters of friends, associates, and family (R 57-93). He thereupon filed his request for discharge on January 20, 1970 (R 2). Upon receipt of his application, the RCPC directed that certain aspects of the processing of his application, required by AR 135-25, be completed at Fort Ord, California, near LT. STRAIT's home within the Northern District of California (R 93 and Respondents' Exhibit A-82). Accordingly, various interviews and hearings were held at Fort Ord during February and early March 1970 (R 98-102).

LT. STRAIT's application and supporting letters, and the reports of the three interviewing officers (all favorable), were then forwarded to Fort Benjamin Harrison, Indiana, for further processing (Respondents' Exhibit A-85). It is critical to note here that none of the events which thereafter transpired, and which are hereinbelow described, were known to LT. STRAIT or his counsel until after suit was filed in the district court. None of the information which was added to his discharge application file was made known to him, nor was he even apprised that such information would be added to his file.

The first transaction which apparently occurred at Fort Benjamin Harrison was a review of LT. STRAIT's file by a Lt. Col. Raymond M. Vawter, Chief of the Delayed Officer Management Division. Lt. Col. Vawter recommended disapproval, primarily on the basis that LT. STRAIT's views were not religious in nature (R 222). With this recommendation attached, the file was then apparently forwarded to the Conscientious Objector Discharge Review Board.[4]

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[4] The Conscientious Objector Discharge Review Board at Ft. Benjamin Harrison reviews all C.O. discharge applications and makes findings and recommendations to the Commanding Officer,

The Review Board consisted of 13 voting members, and two advisory members without vote. Nevertheless, only three of the voting members, and none of the advisory members, were present when LT. STRAIT's case was acted upon. These three members of the board prepared findings which were submitted, together with a recommendation of disapproval, to COL. JOHN H. HOFFMAN, the Commanding Officer of the RCPC. COL. HOFFMAN apparently accepted the recommendation on the same day (April 7, 1970), and disapproved the request for discharge (R 156-162). LT. STRAIT was informed of the decision by a letter from Lt. Col. Vawter, dated the same day, which vaguely summarized the reasons for the decision (Respondents' Exhibit A-1).

This judicial proceeding challenging that administrative action was thereupon commenced.

Summary of Argument

The general question presented by this petition for certiorari is the jurisdictional basis for federal court review of military administrative determinations affecting the constitutional and statutory rights of reserve soldiers. LT. STRAIT relied upon several jurisdictional statutes, all of which were pleaded below: 1) Habeas Corpus under 28 U.S.C. §2241; 2) Mandamus under 28 U.S.C. §1361; 3) Ad-

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RCPC, who is delegated the power to make final decisions. (AR 135-25, para. 7(i).) The Review Board thus has a function somewhat similar to the old Department of Justice Conscientious Objector Section which, under the pre-1967 Selective Service Act, reviewed applications for I-O classifications and hearing officers' summaries and made findings and recommendations based thereon to State Appeal Boards.

ministrative Procedure Act under 5 U.S.C. §§701-703; and 4) Federal Question under 28 U.S.C. §1331(a).

The habeas corpus jurisdictional issues raised in this case arise, as the Court of Appeals correctly noted in its now-vacated opinion of February 17, 1971, because recent cases of the Supreme Court expanding the availability of habeas corpus have created "a whole new class of petitioners, many of whom, like appellant, may be in custody in a state other than that in which the respondent is located" (Appendix A2 at 48). See also, *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1181 (2d Cir. 1970).

The situation is further exacerbated because the Habeas Corpus statute 28 U.S.C. §2241 is ambiguous as to the time and space limitations of custody, making uncertain the territorial jurisdiction of courts to grant writs of habeas corpus. This ambiguity exists no doubt because the statute in question was enacted prior to the Supreme Court's habeas-expanding decisions. As a result, Congress could not have contemplated situations like that presented herein where the petitioner and "custodian" are located in different states. This Court has expressly withheld judgment on the problem thus posed. *Nelson* v. *George*, 399 U.S. 224, 228 n. 5 (1970).

The Court is confronted here with a question of either personal jurisdiction or venue, the exact nature of the problem having divided the lower federal courts. Compare, *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16 (2d Cir. 1969) [personal jurisdiction] and *Word* v. *North Carolina*, 406 F.2d 352 (4th Cir. 1969) [venue]. Both respondents and the court below concede that subject matter jurisdiction exists. The question thus is not whether a forum exists, but where.

The mandamus issues arise from the narrow definition of the scope of mandamus jurisdiction adopted by the Ninth Circuit in *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970), and the adoption of an "extraordinary writ" rule in the instant case by analogy to mandamus against judges. The *Jarrett* doctrine undercut much of the intent of Congress when it enacted 28 U.S.C. §1361, and the further embellishments adopted hereinbelow gutted virtually all of what remained. Under the tests now in force in the Ninth Circuit the availability of administrative mandamus is virtually non-existent. Moreover, the court has also neatly emasculated the expansive territorial provisions of 28 U.S.C. §1391(e), having forced a significant class of cases involving administrative review into one or two isolated federal judicial districts.

Jurisdiction under the Administrative Procedure Act was pleaded in the district court, but the question was not reached in view of its holding that it had habeas corpus jurisdiction. Nor was the issue argued or fully briefed in the Court of Appeals. Nevertheless, in the intervening period this Court decided *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), which casts an entirely new light on the question. Depending on its resolution of the habeas corpus and mandamus issues, LT. STRAIT asks that this Court review the decision below in light of *Overton Park*.

The questions raised under the federal question heading are likewise substantial and also recurring, including as they do the troublesome question as to the effect of the $10,000 jurisdictional amount provision of 28 U.S.C. §1331 in cases raising substantial constitutional issues.

All the issues are of a recurring nature raising substantial questions of federal law which have divided the lower federal courts.[5]

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[5] As noted in fn. 3, delayed active duty Army officers number in the thousands. Moreover, in recent years the number of members of the military seeking judicial review of denials of requests for conscientious objector discharge has "mushroomed". Hansen, *Judicial Review of In-Service Conscientious Objector Claims*, 17 U.C.L.A. L. Rev. 975, 976 (1970). Questions involving jurisdiction of federal district courts to review such claims of reservists have arisen in following reported cases:

1. JURISDICTIONAL RULINGS FAVORABLE TO PETITIONER

a. *Non-Unit Reservists*

Strieb v. *Gasiewicz*, 3 SSLR 3729 (7th Cir. 1970); *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471 (E.D. Pa. 1970); *United States ex rel. Wirtz* v. *Sheehan*, 319 F. Supp. 146 (E.D. Wis. 1970); *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969); *Nason* v. *Secretary of the Army*, 304 F. Supp. 422 (D. Mass. 1969); *Berman* v. *Resor*, 302 F. Supp. 1200 (N.D. Cal. 1969); *United States ex rel. Olsen* v. *Laird*, 3 SSLR 3774 (M.D. N.C. 1970); *Decker* v. *Wheeler*, 3 SSLR 3286 (D. Minn. 1970).

b. *Unit-Assigned Reservists*

Hammond v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Silberberg* v. *Willis*, 306 F. Supp. 1013 (D. Mass. 1969), *reversed on other grounds*, 420 F.2d 662 (1st Cir. 1970); *Morin* v. *Grade*, 301 F. Supp. 614 (W.D. Wis. 1969); *United States ex rel. Day* v. *Laird*, 3 SSLR 3571 (M.D. N.C. 1970).

2. JURISDICTIONAL RULINGS UNFAVORABLE TO PETITIONER

a. *Non-Unit Reservists*

United States ex rel. Conrad v. *Laird*, 318 F. Supp. 1329 (E.D. Wis. 1970); *McKay* v. *Secretary of the Air Force*, 306 F. Supp. 1252 (D. Mass. 1969).

b. *Unit-Assigned Reservist*

United States ex rel. O'Hare v. *Eichstadt*, 285 F. Supp. 476 (N.D. Cal. 1967).

Cf. also, *United States ex rel. Greenwood* v. *Resor*, 439 F.2d 1249, 1252 n. 5 (4th Cir. 1971); *United States ex rel. Hutcheson* v. *Hoffman*, 439 F.2d 821 (5th Cir. 1971); *Metz* v. *United States*, 304 F. Supp. 207 (W.D. Pa. 1969).

ARGUMENT

I.

Habeas corpus jurisdiction.

LT. STRAIT argued, albeit unsuccessfully, in the Court of Appeals that on its face *Schlanger* v. *Seamans*, —— U.S. —— (1971), did not compel a dismissal of his action. Rather he contended, and still contends, that the two cases are factually and legally distinguishable in several critical respects. Indeed, in its February 17 opinion the Court of Appeals had expressly distinguished the instant case from *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970); whereas *Schlanger* had been affirmed by the 9th Circuit in a brief per curiam opinion relying solely on *Jarrett*. *Schlanger* v. *Seamans*, 3 SSLR 3323 (9th Cir. 1970).

Furthermore, LT. STRAIT's contentions and the Court of Appeals initial ruling on the habeas corpus jurisdictional question derive support from the line of cases cited in note 5, *supra* at 1a. This line of cases was known to the Supreme Court when it decided *Schlanger*. In fact in *Schlanger* the high Court twice cited *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969), which has come to be known as the leading case in support of LT. STRAIT's position.[6]

Nevertheless, the Court did not disapprove that line of decisions, which it easily could have done, but clearly left the door open for later consideration in an appropriate case. LT. STRAIT now presents that case, and urges that the Court distinguish *Schlanger* and permit habeas corpus

[6] The Solicitor General also recognized the existence of *Donigian* and expressed qualified acceptance of it. *Schlanger* v. *Seamans*, *supra*, Brief of Respondents in Opposition to Petition for Writ of Certiorari 5.

jurisdiction in the district of a military reservist's residence and domicile. The critical factual and legal distinctions forming the basis for such a decision follow.

A. Schlanger *Is Factually Distinguishable.*

Sgt. Schlanger was on active military duty in the Air Force when he filed his petition for a writ of habeas corpus. He was assigned to a specific and functioning unit at Moody Air Force Base, Georgia, where he had actually been present and performing duties shortly before he commenced his action. 91 S.Ct. at 996; Brief of A.C.L.U. as Amicus Curiae at 3. He had been permitted a temporary leave from his unit of 70 days duration in order to attend a summer session at the University of Arizona, and he was under orders to report back to Moody AFB. 91 S.Ct. at 996, n. 1. Sgt. Schlanger had no contact whatsoever with Air Force personnel in Arizona at the time he filed his action. 91 S.Ct. at 997.

Contrast LT. STRAIT, on the other hand—an inactive reserve officer who was not even required to attend monthly drills. He was assigned to no functioning unit; rather, his military file was maintained at a centrally located, national, record-keeping center. He permanently resided, without interruption, from the day he became a member of the military to the day he filed his action, in San Francisco within the Northern District of California. All of his contact with the Army occurred within the Northern District of California, either by mail or directly with military personnel under the command of the Commanding General of the Sixth Army at the Presidio of San Francisco. LT. STRAIT's few sorties onto a military base for military purposes were limited exclusively to visits to Army bases

within the Northern District of California. In short, if LT. STRAIT has a "duty station" at all it is at his place of residence.

These factual distinctions have independent legal significance which will be discussed *infra*.

B. *Active Duty v. Reservist.*

The difference between active servicemen and reservists has often been considered an important legal distinction in military habeas corpus cases.

When these cases first appeared in the courts, the government contended that reservists, unlike those on active duty, were not "in custody." This argument was disposed of in the watershed case of *Hammond* v. *Lenfest,* 398 F.2d 705 (2d Cir. 1968), and it has not appeared since. In fact, the government has now come full circle and presently argues that no realistic differences exist at all between the custody status of reservists (including those on inactive status) and active servicemen.

The truth lies in between,[7] a reality which has been consistently recognized by the courts that have ruled on the jurisdictional question raised here. See authorities cited in note 5, *supra*. There are numerous significant reasons for the recognition of this legal distinction.

Normally there will be little doubt as to the precise location of the active serviceman's duty station. To the extent there is confusion, it will probably have resulted from

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[7] For example, para. 7 of AR 135-25, the Army's C.O. discharge regulation applicable only to reservists, speaks of "[c]ommanders having custody of the member's records . . . ," as opposed to custody of the individual *per se*.

a voluntary departure on the part of the petitioner. E.g., *Schlanger* v. *Seamans, supra; Jarrett* v. *Resor, supra.* Lt. Strait, by contrast, although he temporarily departed San Francisco to attend law school, had returned to his permanent residence, and hence his "duty station" at the time he filed this action.

Nevertheless, because his custodial status is extremely loose, it may be impossible to ascertain with certainty what district, if any, is the locus of his custody. Upon departing his place-of-residence "duty station," he became a mere volunteer: a "forum shopper," albeit a reluctant one.

Furthermore, the active serviceman will not necessarily be inconvenienced by having to bring the action in the district where his duty station is located,[8] whereas the reservist may be forced to suffer considerable hardship in order to obtain a forum. See, *Berman* v. *Resor,* 302 F. Supp. 1200, 1202 (N.D. Cal. 1969).

This latter result will be especially true if, in the last analysis, the various jurisdictional hurdles create a no-man's land, or create barriers to judicial relief based on financial hardship, which force some reservists to report for active duty in order to establish the requisite custodial relationships for habeas corpus purposes. Cf., *Ahrens* v. *Clark,* 335 U.S. 188 (1948). Such a result will cause the Great Writ to become the static, formalistic remedy, disapproved in *Schlanger* itself. 91 S.Ct. at 998, n. 5.

More importantly, the Constitution provides that "the privilege of the Writ of Habeas Corpus shall not be sus-

[8] It is hard to conceive how Sgt. Schlanger, for example, could have been terribly inconvenienced by being required to return to Georgia and file his suit there.

pended. . . ." Article I, §9. Needless exaltation of form over substance may lead to that result in these cases at critical points in time, while offering no additional benefit to the government in its ability to respond.

C. *The Commanding Officer of the Reserve Personnel Center Was "Present" in the District for Purposes of Habeas Jurisdiction.*

In its February 17 opinion, the Court of Appeals concluded that as a result of his substantial contacts with the petitioner in the district (contacts pertaining to the very issues before the Court), the Commanding Officer of the Reserve Personnel Center was "sufficiently present [in the district] to be subject to the jurisdiction of that court" (Appendix A2 at 48). Accord: *Donigian* v. *Laird, supra; United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471 (E.D. Pa. 1971).

In *Schlanger* the Supreme Court noted this method of resolving the personal jurisdiction question but did not rule on it. 91 S.Ct. 997. The Court no doubt felt that this approach (which is a derivative of the "contacts" theory of personal jurisdiction long applied in non-habeas civil litigation, *e.g., McGee* v. *Int'l Life Ins. Co.,* 355 U.S. 220 (1957), and *Int'l Shoe Co.* v. *Washington,* 326 U.S. 310 (1945)) should not be ruled upon in a case that did not present the issue. In fact, the *Schlanger* opinion carefully noted the complete lack of any contact between Sgt. Schlanger and Air Force officers in Arizona. 91 S.Ct. 997-8.

D. *LT. STRAIT Was Not Forced to Rely Upon 28 U.S.C. §1391(e) to Obtain Personal Jurisdiction.*

The Supreme Court in *Schlanger* noted that the only manner in which Sgt. Schlanger could serve process on any appropriate respondent was by use of 28 U.S.C. §1391(e),

and it further noted that, in its opinion, §1391(e) was not intended to extend habeas corpus jurisdiction. 91 S.Ct. 997, n. 4.

Unlike Sgt. Schlanger, however, LT. STRAIT did not exclusively rely upon §1391(e), for he personally served the Commanding General of the Sixth Army within the confines of the district court's territorial jurisdiction (R 108). He contends that said officer is an appropriate respondent being an integral part of LT. STRAIT's chain of command.

Subordinates of the Sixth Army Commander acted on behalf of the RCPC throughout LT. STRAIT's Army tenure, but especially and extensively in connection with the C.O. application which was the subject of the action in the district court. AR 135-25 provides that "[a]rea commanders will provide assistance upon request from the Commanding Officer, U.S. Army Reserve Components Personnel Center . . . to arrange for necessary interviews of non-unit reservists residing in their geographical area of *jurisdiction*." Para. 7.c. [Emphasis added:] Thus the Army recognizes by its choice of words the decentralized nature of its control over petitioner and others similarly situated.

The Army thus admits that for its purposes of control and administration, LT. STRAIT was within the jurisdiction of local area commanders, but apparently now denies that those area commanders are within the jurisdiction of a co-extensive district court when the same reservist seeks the court's aid vis-a-vis the very same activities carried on in the district. The subordinates of said area commander are the only military personnel with whom LT. STRAIT has ever had any personal contact. The officers at the Reserve Personnel Center have always contented them-

selves with communication with LT. STRAIT by mail or through 6th Army personnel, although they now object to that privilege flowing both ways.

Accordingly, the area commander (Lt. Gen. LARSEN) must be considered a necessary respondent, being an integral part of the chain of command, or he must be considered an agent for service of process of LT. STRAIT's ultimate commanding officer, who, having entered the district for some purposes, remains subject to the court's process in a case relating to those activities. Cf., *Ex Parte Endo*, 323 U.S. 283 (1944).

E. *Summary.*

For all of the above reasons, it is possible to meaningfully distinguish *Schlanger* v. *Seamans, supra,* from the instant case. The practical realities of the situation also dictate such a result. The great purposes of the writ of habeas corpus, one of which is its immediacy as a remedy, Developments, "Federal Habeas Corpus," 83 HARV. L. REV. 1038, 1040 (1970), must not be frustrated by meaningless and unreal quibbles over personal jurisdiction.

If the issues here are tested in terms of the policy considerations behind the Congressional enactment, the Army's contentions are completely drained of any viability. The importance of obtaining personal jurisdiction over respondents in habeas proceedings is to protect against *ex parte* determinations. The parties must have actual notice and an opportunity to be heard in order to satisfy the due process clause. *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). In the instant case there can be no suggestion that the Army did not have actual, sufficient notice of the proceedings, nor that it did not have a meaningful opportunity to

be heard, nor that the Northern District of California was an inconvenient forum; indeed, it responded promptly and vigorously and was effectively represented. There likewise can be no suggestion that its ability to respond would be meaningfully enhanced by requiring LT. STRAIT to bring the action elsewhere, while all must agree that LT. STRAIT would be greatly disadvantaged thereby.

In short, the result below clearly violates the enjoinder of Judge Northrop in *Donigian* v. *Laird*, 308 F. Supp. at 452, *supra*, that "[f]orm in this instance cannot prevail over substance."

II.

Mandamus jurisdiction.

LT. STRAIT also pleaded jurisdiction pursuant to 28 U.S.C. §§1361 and 1391(e), both for the purpose of reviewing the ultimate decision on the merits (which he alleged was contrary to the regulatory criteria and without basis in fact) and for the purpose of reviewing his allegations that his application was processed in a manner contrary to regulations. The Court of Appeals implicitly rejected the first basis of jurisdiction, apparently in reliance on *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970). It conceded that limited mandamus jurisdiction existed to review the procedural irregularities, *Feliciano* v. *Laird*, 426 F.2d 424 (2d Cir. 1970); *Schatten* v. *United States*, 419 F.2d 187 (6th Cir. 1969) but it held that the exercise of that jurisdiction was not appropriate in this case.

With respect to habeas corpus jurisdiction, the court below purported to follow the recent decision of this Court

in *Schlanger* v. *Seamans, supra,* although only this Court can resolve the question whether its reliance on *Schlanger* was correct. In the mandamus area, however, the Court of Appeals struck out into new fields of endeavor, fashioning rules of law regarding mandamus jurisdiction under 28 U.S.C. §1361 that have no support in authority and severely undermine the intent of Congress. Furthermore, even its application of its own newly adopted rules was incorrect in the case at hand.

The substantial issues thus raised are discussed in some detail hereinbelow.

A. *The Ninth Circuit's View of the Scope of Review Under §1361 Is Erroneous.*

The Court of Appeals stated, without expressing its reasoning, that the District Court could not have granted complete relief to LT. STRAIT pursuant to its mandamus jurisdiction (Appendix A1 at 42). This assumption apparently derives from the Ninth Circuit's earlier ruling in *Jarrett* v. *Resor,* 426 F.2d 213, *supra,* that 28 U.S.C. §1361 is not available to test on the merits a denial by the military of a request for conscientious objector discharge. In *Jarrett* the Court held that in such a case the duty owed to the petitioner is not "ministerial" in nature and hence not subject to review in mandamus.

The Ninth Circuit's view of the scope of mandamus jurisdiction rests on a dubious reading of Congressional policy and is in conflict with decisions in other circuits and districts. See e.g., *Bluth* v. *Laird,* 435 F.2d 1065 (4th Cir. 1970); *United States ex rel. Schonbrun* v. *Commanding*

Officer, 403 F.2d 371 (2d Cir. 1968); *Ashe* v. *McNamara,* 355 F.2d 277 (1st Cir. 1965); *United States ex rel. Clements* v. *Laird,* 3 SSLR 3863 (D. Md. 1971); *United States ex rel. Olsen* v. *Laird,* 3 SSLR 3774 (M.D. N.C. 1970). Moreover, its use and application of the terms "ministerial" and "discretionary" are open to serious question.

In the Mandamus and Venue Act of 1962, 28 U.S.C. §§1361 and 1391(e), Congress greatly expanded the power of the federal district courts to review claims by individuals that officials or agencies of the government had violated their legal rights by failing to act in accordance with prescribed law. Some commentators have argued that Congress intended to expand the scope of judicial review of federal agency actions. E.g., Byse and Fiocca, *"Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action,"* 81 HARV. L. REV. 308 (1967).

There can be no question that Congress intended to make it easier and more convenient for citizens to challenge alleged illegal government actions in the courts, as well as to ease the burden on certain districts where certain classes of cases could exclusively be maintained theretofore. Senate Report No. 1992, accompanying H.R. 1960, 1962 U.S. Code Cong. and Adm. News 2785. Nor can there be any question that the result below defeats both purposes of Congress, since it makes it harder for a citizen like LT. STRAIT to sue the Army by requiring him to initiate action in a distant state, while at the same time concentrating these cases in the districts where military administrative centers are located.

Although members of Congress were concerned that §1361 would not permit the district courts to interfere with

decisions ordinarily entrusted to agency discretion, Senate Report 1992, *supra* at 2787, it is often difficult to draw the line between discretionary and non-discretionary actions, especially where the interpretation of statutes and regulations is concerned. As the court said in *Ferry* v. *Udall*, 336 F.2d 706, 711 (9th Cir. 1964), "We recognize the intrinsic difficulty in determining whether a discretionary action of an agency is reviewable."

Moreover, the limitations on review of discretionary actions have always been understood not to restrict court review where discretion is abused, either substantively or procedurally. L. Jaffe, *Judicial Control of Administrative Action*, 363 (1965). See also, *United States ex rel. Schonbrun* v. *Commanding Officer*; 403 F.2d at 374, *supra*.

Furthermore, when courts have stated that the mandamus provisions apply only to non-discretionary, "ministerial" acts, they have seldom, if ever, attempted to draw a careful definition of that term. To many, the descriptive term "ministerial" connotes a "rubber-stamp" function such as those performed by clerical employees who receive and process papers for the benefit of those who make the discretionary decisions. But this surely is not the scope intended by Congress or by the courts who have interpreted §1361. Although the language in opinions often belies it, most courts would readily admit that the issue is much more subtle. In fact, Prof. Jaffe suggests that "the notion that each administrative decision can be classified a priori either as 'ministerial' or 'discretionary' is unsound and unworkable." JAFFE, *supra* at 181.

Thus, although the secretary of the department would appear to have wide discretion in deciding whether or not

to discharge members of the service subject to his control and authority, there are limitations on his discretion—limits imposed by statutes, regulations, court decisions—and factual findings may be so overriding as to make his ultimate decision a foregone conclusion and, in any particular case, not one committed to discretion at all. It is this type of agency determination that has traditionally been subject to mandamus jurisdiction, even though some elements of interpretation of law and weighing of facts are present.

Again, the Ninth Circuit succinctly summarized the issue in *Ferry* v. *Udall, supra,* 336 F.2d at 713, as follows:

> "The discretion of the Secretary is limited to deciding whether these requirements have been met. Judicial review . . . is available, since it would be anomalous to allow [an applicant] to lose rights, the conferring of which is made mandatory by the applicable statute, merely because . . . the Department . . . made erroneous or arbitrary decisions. . . ."

This formula is, of course, a reiteration of the basic formula for mandamus expressed nearly a half century ago by Chief Justice Taft in *Work* v. *United States ex rel. Rives,* 267 U.S. 175, 177-78 (1925). See also, *Roberts* v. *United States,* 176 U.S. 221 (1900).

An agency or official may indeed be given unbridled discretion in certain decision-making areas by virtue of statute or regulation. E.g., *United States* v. *Walker,* 409 F.2d 477 (9th Cir. 1969). Such pure discretionary powers are usually so obvious as to be beyond debate, and moreover, Prof. Jaffe warns us that such absolute discretion is "excep-

tional." JAFFE, *supra* at 181. But once Congress by statute, or the agency by rule, establishes rules to be followed, any action thereunder is reviewable by mandamus if it has clearly failed to follow the established criteria. *McKay* v. *Wahlenmaier*, 226 F.2d 35, 47 (D.C. Cir. 1955); *Carey* v. *Local Board No. 2*, 297 F. Supp. 252 (D. Conn.), *aff'd*, 412 F.2d 71 (2d Cir. 1969).

The failure of an agency to correctly apply the statutory or regulatory criteria as an object of mandamus relief has been eloquently urged by Prof. Jaffe, as follows:

> "Before a court can decide that an official 'has discretion' whether or not how to act, it must decide what relevant discretion has been granted. This decision will rest on an interpretation or construction of the statute conferring the power. Under our constitutions and our common law the courts have the power to determine the legality of administrative action. This is the power to decide the rule of law which defines the granted area of discretion.
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> "In short the officer may have discretion, not only to find the facts, but to choose the law. This means that he may make a choice which the court might not itself have made as an original proposition. But if a court is convinced that the rule chosen by the officer is clearly contrary (in its opinion) to the statutory purpose, then it will order the officer to act according to its view of the law; it will not and should not desist merely because in a general sense the officer has discretion. He has exercised his discretion contrary to law and in this sense he has violated a clear duty." JAFFE, *supra* at 181-2 and 183-4.

This approach would certainly seem to make mandamus available to review in-service denials of requests for discharge, especially if the courts are going to insist on applying the "basis in fact" test in such cases. When the agency decision is tested under the basis in fact standard of review the possible infringement upon agency discretion becomes nil. Often cases involve a determination as to whether the uncontested facts compel a result favorable to the aggrieved serviceman under the regulatory scheme. In other words, if there is "no basis in fact" for the denial of the claim, then it can be said that the agency owed a duty to the plaintiff to grant the requested relief, and abused its discretion by failing to act accordingly. Cf., *Estep* v. *United States,* 327 U.S. 114 (1946); see also, JAFFE, *supra* at 366-7 and 374.

Such a view of "discretionary actions" and their amenability to judicial review has recently been approved by the Supreme Court in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971).

The Ninth Circuit's position on mandamus jurisdiction, as expressed in *Jarrett* v. *Resor, supra,* appears to be based on a view of administrative discretion that is contrary to the general view described above. Moreover, its position has the effect of seriously undercutting the purposes behind the enactment of 28 U.S.C. §1361.

B. *The Court of Appeals Improperly Confused Judicial Mandamus With Administrative Mandamus.*

The court below held that "[m]andamus is an extraordinary remedy which is to be utilized only in the most urgent cases," paraphrasing *Ex Parte Collett,* 337 U.S. 55, 72 (1949) (Appendix A1 at 42). The precise language in

the cited case is as follows: "Mandamus prohibition and injunction *against judges* are drastic and extraordinary remedies. . . ." [Emphasis added.] *Cmax Inc.* v. *Hall*, 300 F.2d 265 (9th Cir. 1962), and *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968), also cited by the court, are likewise cases involving mandamus against judges.

Careful analysis of the cases cited by the Court of Appeals reveals that there is a critical distinction between judicial mandamus and administrative mandamus. Mandamus against judges truly lies within the "sound discretion" of the courts, after considering such factors as relative hardship to the parties, misuse of judicial resources, etc. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d at 952-3, *supra*.

Administrative mandamus against federal agencies or officials under 28 U.S.C. §1361 is much less committed to judicial discretion. Although it too is referred to as an extraordinary remedy, the "discretion" of the courts to refuse to grant the remedy is severely limited. Once the court determines that there is a clear showing of erroneous official action and that administrative remedies have been exhausted, the court can only refuse to grant relief if it finds that another adequate remedy exists.[9] *Hancock* v. *Laird*, 415 F.2d 234, 236 (9th Cir. 1969).

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[9] *Whitehouse* v. *Ill. Cent. R. Co.*, 349 U.S. 366 (1955), cited by the court below is not to the contrary and is inapposite as well. The court there was concerned with the irreparable harm criteria associated with injunctive relief, and moreover, it was unable to find a clear showing of erroneous official action inasmuch as administrative remedies had not been exhausted. Here administrative remedies have been exhausted and the threat of irreparable harm is clear.

Here the Army had a clear duty 1) to process LT. STRAIT's application in accordance with its own regulations and 2) to grant his request unless a basis in fact existed to justify a denial of his request for discharge. See, *Negre* v. *Larson*, 401 U.S. 437 (1971); *United States ex rel. Donham* v. *Resor*, 436 F.2d 751 (2d Cir. 1971). Its failure to do either in this case constitutes a clear showing of erroneous official action (as found by the Court of Appeals in its February 17 opinion [Appendix A2 at 53]). As such it is amenable to judicial relief in the nature of mandamus. 28 U.S.C. §1361.

Even if the court was correct, however, it failed to exercise that discretion, or more properly, to remand the proceedings to the district court for its exercise of discretion.

In the cases cited by the court, the factors to be weighed in the exercise of sound discretion included the relative harm to be suffered by the parties and the possibility of duplicative litigation, the possibility of irreparable injury and miscarriage of justice. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968); *Cmax Inc.* v. *Hall*, 300 F.2d 265 (9th Cir. 1962).

Many, if not all, of these criteria can be found in this case indicating that "extraordinary" relief should be granted.

1. LT. STRAIT faces the irreparable injury of either reporting for military duty contrary to his belief of conscience or subjecting himself to the harsh, military penal domain.

2. LT. STRAIT has already litigated this case at great expense both at the district court and court of appeals

level and both courts have rendered decisions on the merits. To require him to start again from scratch in another district is most certainly a waste of judicial resources and an overbearing imposition on the litigants to the action.

3. In two thoughtful and thorough opinions, a three-judge panel of the court of appeals unanimously found there was no basis in fact for the Army's decision. Under the present opinion LT. STRAIT must now subject himself to determination anew by a single district judge who may see the matters from a different perspective and rule in an opposite manner. This would certainly be a miscarriage of justice.

4. Respondents could seek a change of venue if they are inconvenienced, as the court below noted (Appendix A2 at 48, n. 4). Moreover, their adherence to the waivable personal jurisdiction objection on rehearing herein reveals their motives as the real "forum shoppers" in these cases.

5. Finally the hardship on LT. STRAIT in the context of this case warrants resort to extraordinary remedies. The particular hardship and the court's assumption that another adequate remedy exists will be discussed in more detail below.

The Court of Appeals' casual, and highly inaccurate, treatment of the "sound discretion" to be exercised by courts in administrative mandamus cases was itself an error of significant proportion. Moreover, the court heard no argument and permitted only tentative briefing (Response to Petition for Rehearing) on the issues thus disposed of. For this reason alone the judgment should be vacated and the cause remanded for further proceedings.

C. *The Existence of Possible Habeas Corpus Jurisdiction in a Distant District Is Not Another Adequate Remedy.*

While it is true that under certain limited circumstances, a court may decline to exercise mandamus jurisdiction, if it finds that another adequate remedy exists, *Carter* v. *Seamans,* 411 F.2d 767 (5th Cir. 1969), that doctrine carries its own limitations. Those limitations go to the question whether or not the other remedy is really "adequate".

1. Does the Other Remedy Truly Exist?

A first and obvious criterion would be a determination that the alternate remedy exists beyond question—that no new jurisdictional objection can be raised to it. See, *Carter* v. *Seamans, supra.* Here the Court of Appeals merely indicated that LT. STRAIT "*may* obtain relief by habeas corpus in Indiana. . . ." (Appendix A2 at 42 [emphasis added]). The Court obviously could not say with any assurance that the district court in Indiana would find LT. STRAIT in custody in Indiana in view of his lack of any physical presence there. See, *Nelson* v. *George,* 399 U.S. 224, 228 n. 5 (1970); *Ahrens* v. *Clark,* 335 U.S. 188 (1948).

Second, the alternate remedy referred to must be a remedy at law for which venue would clearly exist under 28 U.S.C. §1391(e) and not another extraordinary, equitable remedy.[10] Indeed, the very history behind the enactment of 28 U.S.C. §1361 leads inescapably to that conclusion. When §1361 was enacted, citizens already had the remedy of suing in the District of Columbia when official acts were challenged. §1361 did not abolish actions in the

[10] In fact in *Carter* v. *Seamans, supra* at 771, the other remedy, i.e., an action in the Court of Claims, was once the *exclusive* remedy for the cause of action, although by later amendment the remedies were designated as "concurrent."

District of Columbia, but merely added a new, alternative remedy.

Nevertheless, the Ninth Circuit's position would virtually abolish §1361 for all intents and purposes since, in its view, the existence of another adequate remedy, i.e., common law mandamus in the District of Columbia, will always make the exercise of §1361 jurisdiction "inappropriate".

In *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968), the court expressed the view that mandamus and habeas corpus are mutually available. The court said:

> "Whether or not habeas corpus is available, the district court was free to treat the petition as one for mandamus under 28 U.S.C. §1361. . . ." 403 F.2d at 374.

Accord: *United States ex rel. Clements* v. *Laird*, 3 SSLR 3863, *supra*; *United States ex rel. Olsen* v. *Laird*, 3 SSLR 3774, *supra*.

Consequently, the Ninth Circuit's view of the law starkly conflicts with that of the Second Circuit and district courts in the Fourth Circuit.[11]

2. Is Habeas Corpus in a Distant State Adequate?

Finally, and perhaps most importantly, the Court of Appeals view of what is an *adequate*, alternative remedy,

[11] The above-cited decisions may have reflected a realization by those courts that a contrary result (*i.e.*, the result reached by the Ninth Circuit herein) would, in addition to creating hardships for the individuals concerned, create a situation of concentrating certain classes of cases in single districts—a result Congress has consistently sought to avoid both in various amendments to the Habeas Corpus Statute, 28 U.S.C. §2241(d) and 28 U.S.C. §2255, and in the Mandamus and Venue Act of 1962, 28 U.S.C. §§1361 and 1391(e).

although unexpressed, leaves much to be desired. The court apparently assumes that petitioners, such as LT. STRAIT, are adequately served by having a habeas corpus remedy that *may* be available in a district several thousand miles from their residences.

Aside from the prohibitive cost which will be an effective bar to many persons, the carrying on of litigation in a distant forum has other drawbacks, including inability to obtain and consult with counsel, further inconvenience and hardship if an evidentiary hearing is required, and problems relating to timeliness of actions to be taken. This latter factor alone is sufficiently significant to warrant a finding that, in these cases, habeas corpus in a distant district is not an adequate remedy.

Reviews of denials of requests for discharge from the military are often brought under circumstances requiring immediate judicial action, either in the form of interlocutory relief or fast resolution of the merits in order to prevent harm of an irreparable nature. This case is an example.

LT. STRAIT's request for discharge was denied April 7, 1970, and he was notified of that fact by a letter dated the same day, and by which he was also informed that he would be expected to comply with orders to report for active duty on April 13, 1970 (Respondent's Exhibit A at 1). He thereupon filed this action in the district court and obtained a restraining order on April 10, 1970 (R 106).

The case was then heard, and an order denying the petition was entered July 28, 1970. Counsel immediately obtained a stay of that order on July 31, 1970, in order to seek reconsideration in the district court or an injunction pending appeal (R 232). Both motions were denied on August 4, 1970, but the restraining order was extended 10

days to permit an application for stay to the Ninth Circuit (R 251).

The Army then re-ordered LT. STRAIT to report for active duty on August 17, 1970, and LT. STRAIT filed an application for a stay of those orders with the Court of Appeals, but the Court declined to enjoin his activation in an order entered on August 14, 1970, a Friday, at 4:45 P.M. LT. STRAIT then presented an application to Mr. Justice Douglas at Goose Prairie, Washington, on August 16, 1970, which the Justice granted.

Needless to say the ability of counsel to communicate and consult with his client and to thereafter take appropriate action in fast-moving situations such as that described would be greatly hampered if a distance of several thousand miles separated them. Unless habeas corpus remedies can be utilized in this quick manner the remedy is inadequate, if not non-existent.

It has been said that the greatness of the writ of habeas corpus is that it "afford[s] a swift and imperative remedy in all cases of illegal restraint or confinement." *Secretary of State for Home Affairs* v. *O'Brien,* (1923) A.C. 603, 609, quoted in *Federal Habeas Corpus,* 83 HARVARD L. REV. 1038, 1040 (1970). The Supreme Court has likewise cautioned that the Great Writ "is not now and never has been a static, narrow, formalistic remedy. . . ." *Jones* v. *Cunningham,* 371 U.S. 236, 240 (1963).

Nevertheless, the result reached by the Court of Appeals frustrates these grand purposes. The Court not only has taken a very inflexible position as to the territorial availability of the writ, but it has also closed the door to alternate remedies, making the use of the writ in these cases

truly available only to petitioners with both leisure and money at their disposal.

LT. STRAIT believes this result is untenable.

D. *Summary.*

LT. STRAIT contends that the Ninth Circuit incorrectly held that mandamus is not available and that its holding is in conflict with decisions of other circuits. While he alternately contends that the court also incorrectly applied *Schlanger* v. *Seamans, supra,* to his habeas contentions, he also contends that if this Court agrees that *Schlanger* was correctly applied, it must turn to the Court of Appeals' disposition of the mandamus contentions and determine if they were correctly decided.

Because many persons similarly situated to LT. STRAIT will be unable to utilize habeas corpus if the Ninth Circuit's view prevails, its resolution of the mandamus issues are of overriding importance and significance to a substantial class of litigants. Furthermore, while *Schlanger,* by its nature will affect only review of military administrative determinations, the Ninth Circuit's mandamus formula has a broad sweep with serious implications in many areas, particularly the possibility that its formula may have obliterated meaningful use of 28 U.S.C. §1361.

III.

Other jurisdictional statutes.

A. *Review Pursuant to the Administrative Procedure Act.*

The federal district courts have power to "hold unlawful and set aside agency action, findings, and conclusions found to be 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. §702. Certainly this describes review of a decision by the Army denying without any basis in fact a request for conscientious objector discharge. Although certain actions by military agencies are exempted from this provision, *e.g.*, courts martial and decisions made in the field in time of war or in occupied territory, 5 U.S.C. §701(1)(F) and (G), the exceptions are not applicable here.

Doubts as to whether the A.P.A. is "jurisdictional" now appear to have been settled. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971). The Supreme Court's decision there followed a long line of cases that strongly hinted at this result without expressly reaching it. See, *Barlow* v. *Collins,* 397 U.S. 159 (1970); *Data Processing Service* v. *Camp,* 397 U.S. 150 (1970); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967); *Brownell* v. *We Shung,* 352 U.S. 180 (1956).

The Court in *Overton Park* stated that the A.P.A. created a presumption in favor of judicial review to be overcome only by an explicit statutory exclusion. 401 U.S. at 410. Moreover, the fact that other remedies may exist, *e.g.*, habeas corpus, does not defeat jurisdiction under the A.P.A., for, as Prof. Jaffe has said, one function of the

A.P.A. is ". . . to provide an additional, more flexible remedy. . . ." JAFFE, *Judicial Control of Administrative Action,* 372-4 (1965). See also 5 U.S.C. §703.

The respondents may contend that the action under review herein is one "committed to agency discretion", 5 U.S.C. §701, but the Supreme Court noted in *Overton Park, supra,* that "[t]his is a very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410.

Here the essence of LT. STRAIT's complaint is that the Army failed to follow clear regulatory commands in disposing of his request for discharge. The Army had no discretion to deny his request if he met the regulatory criteria and there was no basis in fact for its action. Moreover, to the extent that discretion exists, a denial of a claim without a basis in fact is an abuse of that discretion. See, *United States ex rel. Schonbrun* v. *Commanding Officer,* 403 F.2d 371, 374 (2d Cir. 1968); *Ferry* v. *Udall,* 336 F.2d 706, 713 (9th Cir. 1964); JAFFE, *op. cit.,* at 181-4.

B. *Federal Question Jurisdiction Pursuant to 28 U.S.C. §1331.*

28 U.S.C. §1331 grants jurisdiction to the district courts to hear and determine cases involving questions of federal law. The statute thus grants the district courts jurisdiction to review federal agency determinations. Only two criteria exist for pleading a non-diversity case under 28 U.S.C. §1331, as follows:

> "(1) [T]hat the required jurisdictional amount is present and (2) . . . that the complaint . . . presents a substantial federal question." 6A Moore, Federal Practice, para. 57.23, p. 3136 (1966).

Section 1331 has consequently been extensively used as the jurisdictional basis for suits challenging decisions of the Selective Service System prior to induction. See, *Breen* v. *Selective Service Board No. 16,* 396 U.S. 460 (1970); *Oestereich* v. *Selective Service System,* 393 U.S. 233 (1968); *Fein* v. *Selective Service System,* 430 F.2d 376 (2d Cir. 1970), *cert. granted,* 401 U.S. 953 (1971); *Wolff* v. *Selective Service Board No. 16,* 372 F.2d 817 (2d Cir. 1967); cf. also, *Berk* v. *Laird,* 429 F.2d 302 (2d Cir. 1970). This challenge to a highly analogous administrative decision of the Army, brought by a reservist about to be activated, creates a remarkably similar jurisdictional framework.

The only remaining issue is the question of jurisdictional amount. Many appellate courts have adroitly sidestepped the issue and have proceeded to the merits. E.g., *Breen* v. *Selective Service Local Board No. 16,* 406 F.2d 636, 637, n. 1 (2d Cir. 1969), *reversed on other grounds,* 396 U.S. 460 (1970).

LT. STRAIT agrees with Judge Edelstein in *Boyd* v. *Clark,* 287 F. Supp. 561, 568 (S.D.N.Y. 1968), *aff'd w/o reaching the jurisdictional amount question,* 393 U.S. 316 (1969), that freedom from interference with personal liberty as a result of an arbitrary governmental action "is inherently worth more than $10,000." Accord: *Cortright* v. *Resor,* 325 F. Supp. 797 (E.D.N.Y. 1971).

More importantly, however, LT. STRAIT pleaded the existence of an amount in controversy exceeding $10,000, and that allegation has never been contested. LT. STRAIT also stands ready to prove the existence of potential damages in excess of $10,000 in the event the case should be

remanded to the district court to proceed pursuant to 28 U.S.C. §1331. Cf. *Oestereich* v. *Selective Service System, supra; Berk* v. *Laird,* 429 F.2d 302, 306 (2d Cir. 1970).

IV.

Conclusion.

This case raises several substantial questions of federal law which will affect many persons who are, or may become, adversely affected by administrative decisions of the military services. With respect to most of these questions, the Ninth Circuit's positions vary substantially from those of other circuits and districts, which have followed a much more flexible approach in these cases.

For these reasons petitioner urges that a Writ of Certiorari to the Ninth Circuit Court of Appeals be granted in order that this Court may review and determine these questions.

Dated:

Respectfully submitted,

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APPENDIX A1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 26,289

LIEUTENANT JOHN A. STRAIT,

Petitioner-Appellant,

—v.—

MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army; MAJOR GENERAL PHILLIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN J. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents-Appellees.

[June 4, 1971]

ORDER ON REHEARING

Before:

MERRILL and KOELSCH, *Circuit Judges,* and JAMESON, *District Judge**

* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

Appellees' petition for rehearing is granted.

It is ordered that the opinion filed herein on February 17, 1971, is withdrawn and the judgment rendered is vacated and that in their stead the accompanying opinion and judgment will be filed.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before:

MERRILL and KOELSCH, *Circuit Judges*, and JAMESON, *District Judge**

PER CURIAM:

By these proceedings in habeas corpus, appellant seeks judicial review of an administrative decision of the Department of the Army denying his request for discharge as a conscientious objector. This appeal is taken from judgment of the District Court for the Northern District of California denying, on the merits, the relief sought. A cross-appeal has been taken by appellees from that portion of the District Court's judgment holding that it had jurisdiction in habeas corpus. We do not reach the merits of appellant's appeal, for we conclude that on the cross-appeal of appellees judgment of the District Court must be reversed and the proceedings dismissed for lack of jurisdiction.

Appellant is an officer in the United States Army Reserve. He received his commission in 1966 on completion of the ROTC course at the University of California at Davis. He was then placed on a delayed reserve status in order to permit him to attend law school at Yale University, from which he graduated in 1969. Since he has not yet reported

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* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

for active duty, appellant is attached to no unit. As a member of the army reserves, his activities are directed by the United States Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana.

On January 20, 1970, appellant applied for discharge as a conscientious objector. Pursuant to army regulations the application was submitted to the Reserve Components Personnel Center. Since appellant was residing at his home in the Northern District of California, processing of the application by interviews and hearing was had at Fort Ord, California, and the record was then forwarded to Indiana for review by the Conscientious Objector Discharge Review Board. On the Board's recommendation the application for discharge was disapproved by the commander of the Personnel Center. This action followed.

Appellant argues that he is in custody within the territorial jurisdiction of the District Court below and, therefore, that that court had jurisdiction in habeas corpus. *Schlanger* v. *Seamans*, —— U.S. —— (March 3, 1971), compels us to disagree. Even if we concede that appellant is in custody within the jurisdiction of the District Court (which appellees dispute),[1] his custodian—the commander of the Reserve Components Personnel Center at Fort Benjamin Harrison—remains outside of the jurisdiction of that court. As stated in *Schlanger*: "Hence, even if we assume that petitioner is 'in custody' in Arizona in the sense that he is subject to military orders and control which act as a restraint on his freedom of movement • • • the absence of his custodian is fatal to the jurisdiction of the Arizona District Court."

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[1] This question the Supreme Court in *Schlanger* did not reach, although it noted the problem and cited *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969), on which appellant relies.

Appellant contends that, as an alternative to his habeas corpus theory, the District Court had jurisdiction in mandamus to require the army to process his application for discharge in accordance with regulations with which it has allegedly failed to comply. Mandamus is an extraordinary remedy which is to be utilized only in the most urgent cases. *See, e.g., Ex Parte Collett,* 337 U.S. 55, 72 (1949). Its issuance lies within the sound discretion of the court. *Cmax Inc.* v. *Hall,* 300 F.2d 265 (9th Cir. 1969); *see Whitehouse* v. *Ill. Cent. R. Co.,* 349 U.S. 366, 373 (1955). Since appellant asserts that the army's decision to deny him his discharge was without basis in fact, the mandamus remedy would not afford complete relief. *Cf., Pacific Car and Foundry Co.* v. *Pence,* 403 F.2d 949, 952-53 (9th Cir. 1958). Above all, since appellant may obtain relief by habeas corpus in the federal courts in Indiana, there exists another adequate remedy. *See Carter* v. *Seamans,* 411 F.2d 757 (5th Cir. 1969). For these reasons we feel that issuance of the writ in these circumstances would not be appropriate.[2]

Under the cross-appeal of appellees judgment is reversed and the matter remanded to the District Court with instructions that the proceedings be dismissed for want of jurisdiction.

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[2] This is not to say that the court lacked jurisdiction to issue the writ. The territorial restraints which obtain in habeas do not preclude mandamus jurisdiction. *See Schlanger* v. *Seamans, supra,* at n. 4; 28 U.S.C. §1391(e); Sen. Rep. No. 1992, 87th Cong., 2d Sess., 2 U.S. Code and Adm. News (1962) 2784; 2 Moore's Federal Practice ¶4.29.

APPENDIX A2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCHIT

No. 26,289

LIEUTENANT JOHN A. STRAIT,

Petitioner-Appellant,

—v.—

MELVIN R. LAIRD, Secretary of Defense; STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSEN, Commanding General, Sixth United States Army; MAJOR GENERAL PHILLIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN J. HOFFMAN, Commanding Officer, United States Army Reserve, Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents-Appellees.

[February 17, 1971]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before:

MERRILL and KOELSCH, *Circuit Judges,* and JAMESON, *District Judge**

* Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

MERRILL, *Circuit Judge*:

By these proceedings in habeas corpus appellant seeks judicial review of an administrative decsion of the Department of the Army denying his request for discharge as a conscientious objector. This appeal is taken from judgment of the District Court for the Northern District of California denying, on the merits, the relief sought. A cross-appeal has been taken by appellees from that portion of the District Court's judgment holding that it had jurisdiction in habeas corpus.

Appellant is an officer in the United States Army Reserve. He received his commission in 1966 on completion of the ROTC course at the University of California at Davis. He was then placed on a delayed reserve status in order to permit him to attend law school at Yale University. Upon graduation from law school, and after being permitted to take the bar examination, he was, in July 1969, ordered to report to Fort Gordon, Georgia, on February 9, 1970 to commence two years active duty as an Army officer. The reporting date was later changed to April 13, 1970.

On January 20, 1970 appellant applied for discharge as a conscientious objector. Pursuant to Army regulations respecting reserve officers the application was submitted to the United States Army Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana. Processing of the application by interviews and hearing was had at Fort Ord, California, and the record was then forwarded to Fort Benjamin Harrison for review by the Conscientious Objector Discharge Review Board. On that Board's recommendation the application for discharge was disapproved by the commander of the Reserve Components Personnel Center. This action followed.

A. JURISDICTION

Threshold questions are presented by the cross-appeal of appellees respecting the habeas corpus jurisdiction of the District Court under 28 U.S.C. §2241.

1. *Was appellant "in custody"?*

It is clear from §2241(c) that the petitioner's being in custody is a jurisdictional requirement. The statute, however, does not define custody. Since the Supreme Court's decisions in *Jones* v. *Cunningham,* 371 U.S. 236 (1963), and *Peyton* v. *Rowe,* 391 U.S. 54 (1968), the concept of custody in habeas corpus has taken on new dimensions, both of space and of time. See generally, Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1071-92 (1970).

The question posed is whether a member of the Army Reserve who has been ordered to report for active duty at a future date is presently under restraint sufficient to amount to custody.

This question was dealt with in *Hammond* v. *Lenfest,* 398 F.2d 705, 710-12 (2d Cir. 1968), where it was held that the restraints were sufficient to constitute custody—"a custody loose at the moment but a custody which may at any time be made as close as the military establishment, by future order or regulation, shall direct." 398 F.2d at 711.

We agree.[1]

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[1] *Johnson* v. *Laird,* —— F.2d —— (9th Cir. Nov. 24, 1970), is not inconsistent. There the Army had refused to process the conscientious objection claim of a member of the National Guard filed after he had received orders to report for active duty. This court, in denying habeas corpus, held that the Army was not required to process the claim prior to the applicant's reporting as ordered. This ruling was not due to any lack of custody prior to reporting (the court recognized that potential restraint could suffice), but

2. *Was appellant held in custody within the territorial jurisdiction of the District Court?*

Section 2241(a) provides that the writ may be granted by District Courts "within their respective jurisdiction."

> "The quoted statutory language limits the power of the District Court to hear and determine a petition for habeas corpus to those instances in which the applicant 'both is physically present in the court's territorial jurisdiction and is detained or held in custody within that jurisdiction.' *United States et ux rel Rudick* v. *Laird,* 412 F.2d 16, 20 (2d Cir. 1969)." *Jarrett* v. *Resor,* 426 F.2d 213, 217 (9th Cir. 1970).

In *Jarrett* this court held that the petitioner was not in custody in the Northern District of California. While his home was in that district, he was in active military service and was stationed at Fort Knox, Kentucky. He was on leave in California awaiting "port call" pursuant to an assignment to duty in Vietnam. His command post remained Fort Knox. We held: "A member of the armed forces who is voluntarily in a place another than an assigned post is not in custody in that place." 426 F.2d at 217.

Respondents rely on that case as support for their contention that appellant was not in custody in California. We find that case distinguishable.

Here appellant's home is in the Northern District of California. As a member of the Army Reserve his activities are directed by the Reserve Officers' Components Personnel Center at Fort Benjamin Harrison, Indiana. He

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was based on the fact that assignment to active duty had been ordered as discipline for the petitioner's absence without leave, with which Army business this court refused to interfere.

was, however, attached to no unit. We have here held that he was under sufficient restraint to constitute custody, and it was at his home in California that these restraints were imposed and their effect felt. Certainly the restraint did not involve performance of duty at Fort Benjamin Harrison. Appellant's home in California was, then, the delayed Reserve equivalent of a duty station.[2] We conclude that he was in custody in the Northern District of California.

3. *Was the presence of appellant's commanding officer within the territorial jurisdiction of the District Court essential to its jurisdiction in habeas corpus?*

Historically, habeas corpus was available only to those persons held in actual physical confinement. Therefore, the respondent-custodian was always to be found in the territorial jurisdiction in which the prisoner-petitioner was held in custody. It is not surprising that no case prior to the expansion of the custody concept in *Jones* v. *Cunningham, supra,* held that one in custody within the territorial jurisdiction of the court could not there obtain habeas relief because of the absence of the proper respondent.[3] The

[2] When the reservist is, with the approval of the Center, pursuing activities in a state other than his home, the pursuit of which provided the basis for his delayed status (as was true here while appellant was attending law school in Connecticut), it would seem that he is in custody in that state since he is in effect assigned to duty there and it is there that restraints are felt. *Donigian* v. *Laird,* 308 F. Supp. 449 (D.Md. 1969); *Nason* v. *Secretary of the Army,* 304 F. Supp. 422 (D.Mass. 1969).

[3] There is language in a few cases to the effect that the presence of the respondent within the territorial jurisdiction is required, but the language was not directed to the problem we are facing. In most of the cases the critical factor in the opinion was the fact that the petitioner was not in custody in the jurisdiction. See *United States ex rel. Keefe,* 222 F.2d 390 (D.C.Cir. 1954), *cert. denied,* 348 U.S. 952 (1955); *Sanders* v. *Bennett,* 148 F.2d 19 (D.C.Cir.

territorial restrictions on habeas jurisdiction which did then develop were intended to avoid problems posed by having to transport a prisoner to a distant forum. See *Carbo* v. *United States,* 364 U.S. 611 (1961); *Ahrens* v. *Clark,* 335 U.S. 188 (1948).

Now that one may be in custody although not subject to actual physical restraints, the courts are confronted with a whole new class of petitioners, many of whom, like appellant, may be in custody in a state other than that in which the respondent is located.

We can see no persuasive reason for making physical presence of the respondent a jurisdictional requirement in such cases.[4] Since respondents seek to make their restraints felt on petitioner in California and thereby to extend the reach of their authority into the territorial jurisdiction of the District Court below, the respondents are in our view sufficiently present to be subject to the jurisdiction of that court.

As stated in *Donigian* v. *Laird,* 308 F. Supp. 449, 453 (D.Md. 1969):

> "For its own convenience and economy, the Army has chosen to centralize its command with respect to Reserve Officers in Donigian's position, rather than having smaller commands throughout the country. The

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1945); *United States ex rel. Harrington* v. *Schotfeldt,* 136 F.2d 935, 940 (7th Cir. 1943), *cert. denied,* 327 U.S. 781 (1946). Elsewhere similar language has been used to suggest that a court does not lose its habeas corpus jurisdiction when a petitioner is removed from the district as long as the respondent remains. *Ex Parte Endo,* 323 U.S. 283, 306 (1944).

[4] Of course, as this court noted in *George* v. *Nelson,* 410 F.2d 1179, 1181 (9th Cir. 1969), change of venue, pursuant to 28 U.S.C. §1404(a), is available in proper cases.

> effect on the plantiff is no different, however, than it would be if his orders were issued to him directly from a local headquarters. The Army seeks to exert control over Donigian in Maryland. It cannot, then, avoid the jurisdiction of this court merely because such control is exercised from a point located outside of this state."

The District Court, then, had jurisdiction to entertain these proceedings. Having jurisdiction, venue is conferred by 28 U.S.C. §1391(e). Upon the cross-appeal of appellees, judgment is affirmed.

B. The Merits

In the processing of appellant's application for discharge at Fort Ord, appellant was first interviewed by an Army psychiatrist who found "no signs of psychiatric disease." He was then interviewed by an Army chaplain who reported: "I believe that he is sincere in indicating that his religious beliefs preclude participation in war in any form. I believe that his convictions are primarily religious in basis and origin."

Appellant was then given a hearing by an Army captain as hearing officer. The hearing was thorough, consuming approximately three hours. The report of this officer discussed appellant's concept of a Supreme Being and of the nature of religion and his views respecting violence and war. The report concluded: "Based upon Lieutenant Strait's stated beliefs and the sincerity with which he appeared to hold these beliefs, it is my determination that Lieutenant Strait's beliefs fall within a *very liberal* interpretation of the case of *United States* v. *Seeger*, 85 S.Ct. 850 (1965)." Further, "it is my opinion that Lieutenant Strait's beliefs are sincerely held."

At Fort Benjamin Harrison appellant's record was first reviewed by a lieutenant colonel, chief of the Delayed Officer Management Division, acting in the capacity of appellant's immediate commander. His report recommended disapproval, citing appellant's political activities and concluding that the chaplain and the hearing officer "erred or were misled in their determination that [his] beliefs were religious in origin."

The Review Board then acted and, with three members out of fifteen participating, recommended disapproval for these reasons:

1. That appellant's beliefs were not truly held.

2. That they were not religiously founded but reflected political, sociological and philosophical views and a personal moral code.

3. That appellant's objections to war were confined to this particular war.

We have carefully reviewed the record and conclude that the findings of the Review Board are wholly without basis in fact.

The greater part of the Board's memorandum is devoted to the proposition that appellant's views were not religiously founded. This, appellees concede, was error, since appellant's views meet the standards announced in *Welsh* v. *United States,* 398 U.S. 333 (1970), handed down after the Board had taken its action.

There is no support for the Board's finding that appellant's objections to war were limited to Vietnam. The application makes clear the scope of his objections to violence and to war in general. The fact that his political action and expressions of protest were directed against the

one war in which this country was engaged is not inconsistent with his avowed beliefs. It indicates no more than that there was a limited area in which action in support of his beliefs was called for.

The sole remaining basis for rejection of the application was the Board's finding that appellant's views were not truly held. In this, acting upon the cold record and without benefit of interview or opportunity for rebuttal of its findings by appellant (which opportunity Army regulations appear to regard as due), it rejected the findings of those who had interviewed appellant to the effect that his views were sincerely entertained.

Two reasons were given by the Board. It stated that this was the first case of conscientious objection that the hearing officer had reviewed. This was simple error. The officer had had substantial past experience in this respect.

The sole remaining reason for finding lack of sincerity (and the reason on which appellees now rely as establishing basis in fact) was appellant's delay in applying for discharge after crystallization of his beliefs, which the hearing officer had found to have occurred in his second year of law school. The Board emphasized that there were earlier opportunities—occasions on which, if objections did exist, one would have expected them to be expressed: (1) Appellant in 1968 requested an extension of delay status to permit him to take a bar examination and qualify for judge advocate general commission (which commission he later refused); (2) in 1969 a certificate of medical fitness was provided by him; (3) in 1969 he was promoted to the rank of first lieutenant.

The Board apparently felt that appellant had not adequately explained his delay in expressing his views. It

concluded that he was nothing more than "an educated, skillful opportunist who had used his military status for every shred of protection it could offer and then, when called to active duty, attempted to gain relief from his obligation under the guise of a conscientious objector claim."

But the reasons for appellant's delay were explicitly set forth in his application and in a manner wholly consistent with the existence of conscientious objection.[5] He states that he recognized that he had placed himself "in an untenable position in relation to the Army * * *. The last year of my life has been a stormy period of soul searching and agonizing, trying to reconcile my beliefs and conscience with my contract with the Army." It was the suicide of his cousin (also a conscientious objector) in November of 1969 that ultimately "broke the emotional bind I was in and freed me to assert my beliefs."

We do not find it implausible that one with conscientious scruples[6] should find it difficult casually to dismiss his obligations to the Army. Rather we regard it as wholly consistent with conscientious objection that the enlisted soldier should strive to find some means of reconciling a conflict between conscience and duty in such a fashion that

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[5] The "opportunist" aspect disappears when it is recognized (as counsel for appellees concedes) that the "protection" enjoyed by appellant was no greater than the Selective Service regulations then applicable would have afforded through student deferments.

[6] That appellant's conscience manifested itself in areas other than objection to war is abundantly established. Among other activities he worked for the United States Commission on Civil Rights in Alabama and in the southwest; he participated in a project engaged in reviewing arrest records and interviewing blacks who had been arrested; he served as an observer of the first attempts of the blacks in Mississippi to organize politically.

both might be respected and to postpone repudiation of the claims of duty until it becomes clear that their demands make reconciliation impossible.

Accordingly we find the explanation given by appellant for delay in asserting his claim to be reasonable and credible unless some basis for rejecting it otherwise appears from the record. We have searched in vain for such basis.

We conclude, then, that no basis in fact exists for rejection of appellant's claim and that he is entitled to his discharge.

Appellant in his application for discharge expressed his consent to perform postmilitary work of the nature encompassed by the civilian work program administered by the Selective Service System. His hearing officer, in recommending discharge, recommended that he be required to perform such work. In our view such a condition of discharge would be proper under the circumstances.

Accordingly the matter is remanded with instructions that the Army be allowed a reasonable time within which to grant discharge to appellant pursuant to Army regulations applicable to conscientious objectors; failing which, discharge (subject to an order to perform appropriate civilian work) shall be granted by the District Court.

JAMESON, *District Judge* (Concurring):

I agree with Judge Merrill that there is no basis in fact for rejecting appellant's claim as a conscientious objector on the ground of insincerity. I think it is clear from the record before this court that appellant was a sincere conscientious objector when he applied for discharge on January 20, 1970 and for at least two years prior thereto. This conclusion, however, should not be construed as jus-

tifying or condoning appellant's conduct in accepting the benefits of his reserve commission without disclosing his conscientious objector beliefs until he was called for active duty.

Appellant attended Yale Law School from September, 1966 to June, 1969. The Hearing Officer found that appellant's beliefs were religious in nature, sincerely held, and became "fixed during [his] second year of law school," i.e., between September, 1967 and June, 1968. The finding of the Conscientious Objector Review Board (in a decision prior to Welsh v. United States, 398 U.S. 333 (1970)) that appellant's "alleged conscientious objector beliefs are not truly held" was interwoven with its finding that the beliefs "are poorly grounded in religious training and belief; and any objection to war in any form he might truly hold is based solely on political reasons, sociological experiences, philosophical views, a personal moral code, and objection to a particular war." Appellees concede that appellant's beliefs, "if truly held, would qualify under Welsh v. United States * * *."

Appellant's detailed application recounts substantial anti-war and antidraft activities beginning in the fall of 1967 and, as he stated, much of his work "concerned conscientious objection." All of the other evidence presented in support of the application indicates that appellant's conscientious objector beliefs were truly held under the test of religious belief recognized in Welsh.

On the other hand, I think the Board could properly find that the imminence of active duty was the cause of appellant's application for discharge. On August 20, 1968, appellant requested that his delayed status be continued until January 1, 1970 to permit him to take the California

bar examination and qualify for a Judge Advocate General commission. On February 15, 1969 he returned a Certification of Medical Fitness indicating that he was physically qualified for military service. On June 7, 1969 he was promoted to first lieutenant, and apparently accepted without comment. On July 9, 1969, after declining an appointment in the Judge Advocate General Corps, appellant was notified that he was scheduled to report for active duty on February 9, 1970 (later amended to April 13, 1970). On October 1, 1969 he again requested rescheduling of his active duty commencement date. On January 20, 1970 applicant submitted his application for discharge as a conscientious objector. At no time prior thereto had he asserted his conscientious objector beliefs.

It is true, as appellees argue, that this court has held in a number of cases that the Board may consider "suddenness of conversion," particularly after receipt of an order to report for active duty, in determining whether conscientious objector beliefs are sincerely held.[1] These cases were decided prior to Welsh v. United States and are distinguishable with respect to the religious test to be applied. In most of them there was additional evidence to support a finding of insincerity. By reason of appellant's failure to assert his conscientious objector beliefs until called for active duty, a close question is presented.[2] From a review of all

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[1] See e.g., Maynard v. United States, 409 F.2d 505 (1969); Bishop v. United States, 412 F.2d 1064 (1969); Negre v. Larsen, 418 F.2d 908 (1969); and Speer v. Hedrick, 419 F.2d 804 (1969).

[2] The obvious feeling of the Board that appellant should have submitted an application for discharge at an earlier date is understandable. It is true, as the Board's decision indicates, that appellant was willing to accept any benefits of his status as a reserve officer until he was required to report for active duty. On the other hand, there was no legal obligation to submit an earlier application,

the evidence, however, I conclude that this fact alone is not sufficient to support a finding that applicant's conscientious objector beliefs were not truly and sincerely held.[3]

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and his own explanation, as set forth in Judge Merrill's opinion, is credible, even though different inferences may also properly be drawn.

[3] In fact, it is difficult to see how appellant could have entered active duty without making an application for discharge in the light of his beliefs and activities as set forth in detail in the record.

APPENDIX B

CONSTITUTION OF THE UNITED STATES

Article I, Section 9

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

5 United States Code §701 (Supp. V, 1965-70)

Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 United States Code §702 (Supp. V, 1965-70)

Right of Review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within

the meaning of a relevant statute, is entitled to judicial review thereof.

5 United States Code §703 (Supp. V, 1965-70)

Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

28 United States Code §1331(a) (1964)

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 United States Code §1361 (1964)

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 United States Code §1391(e) (1964)

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 United States Code §2241(a) and (b) (1964)

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

*AR 135-25

Headquarters
DEPARTMENT OF THE ARMY
Washington, D.C. *2 September 1970*

Army National Guard and Army Reserve

DISPOSITION OF CONSCIENTIOUS OBJECTORS

Effective 1 August 1970 in accordance with DA message RCPL 031400Z Aug 70

This change was necessitated by the recent Supreme Court decision, Welsh v. *United States which exempted from military service "all those whose conscience spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." Local supplementation of this regulation is prohibited except upon approval of Chief of Personnel Operations.*

1. Purpose. This regulation prescribes policies, criteria, and procedures governing the disposition of Reserve members of the Army who claim to be conscientious objectors.

2. Applicability. a. This regulation applies to all Reserve members of the Army, except those specified in *b* below.

b. The provisions of AR 600-200, AR 614-106, and AR 635-20 govern the disposition of Reserve members of the Army who claim to be conscientious objectors and who are either—

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* This regulation supersedes AR 135-25, 17 June 1970, and DA message RCPL 031400Z Aug 70(U), subject: Interim Change to AR 135-25, 17 June 1970.

(1) Serving in the active military service in their Reserve status; or

(2) Serving on initial active duty for training in their status as Reserves of the Army.

3. Explanation of terms. For the purpose of this regulation, the following terms will apply:

a. Reserve members of the Army. Commissioned officers, warrant officers, and enlisted members of the Army National Guard of the United States and of the Army Reserve.

b. Conscientious objector. An individual who, by reason of deeply held moral, ethical, or religious beliefs, has been found to be—

(1) Conscientiously opposed to participation in war in any form and conscientiously opposed to participation in both combatant and noncombatant training and service in the Armed Forces (I-O classification); or

(2) Conscientiously opposed to combatant training and service in the Armed Forces (I-A-O classification).

c. Noncombatant service and training.

(1) Noncombatant service and training means—

(*a*) Service in any unit which is unarmed at all times;

(*b*) Subject to individual's acceptance, any service, the primary function of which does not require the use of arms in combat, provided such assignment does not require him to bear arms or to be trained in their use.

(*c*) Service in the Army Medical Department, wherever performed.

(2) Noncombatant training consists of any training which does not have to do with the study, use, or handling of arms or weapons.

4. Policy. a. No vested right exists for an individual to be discharged at his own request by reason of conscientious objection prior to the expiration of his contractual or statutory obligation.

b. All requests for discharge based upon conscientious objections will be handled on an individual basis with final determination made at Headquarters, Department of the Army, in accordance with the criteria and procedures outlined in this regulation. The type of discharge, if separation is warranted, will be determined by the member's military record and the standards and procedures outlined in this regulation. For the purpose of this regulation, active duty for training (ADT), other than initial ADT, or annual training (AT) will not be considered as active duty.

5. Eligibility for consideration. a. Consideration will be given to requests for discharge by reason of conscientious objection to participation in war, in any form, when such objection develops subsequent to the member's entry into military service, whether such entry was by induction, enlistment, or appointment in any component of the Army.

b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious

objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered.

c. Consideration will not be given to requests for discharge based solely on conscientious objection which—

(1) Existed but was not claimed prior to member's initial entry into military service either by induction or enlistment or appointment in any component of the Army; or

(2) Existed but was claimed and denied by Selective Service prior to member's induction into the active military service; or

(3) Based solely upon consideration of policy, pragmatism, or expediency; or

(4) Claims objection to a particular war.

6. Applications for discharge. Reserve personnel requesting discharge by reason of conscientious objection will submit such request in accordance with the following instructions:

a. Applications for discharge by reason of conscientious objection may be submitted on DA Form 2496 (Disposition Form) or by letter. The individual requesting discharge will include in the application, or as an inclosure thereto, the information indicated below as the minimum required for consideration of his request. The individual may submit such other information as desired. All information will be specific in nature; where applicable, dates and/or length of time will be given or estimated. Generalities such as "several years" or "many months" will be avoided.

(1) *General information.*

(*a*) Full name.

(*b*) Social security account number.

(*c*) Selective Service number.

(*d*) Service address.

(*e*) Permanent home address.

(*f*) Name and address of each school and college attended, together with the dates of attendance, and the type of school (public, church, military, commercial).

(*g*) A chronological list of all occupations, positions, jobs, or types of work, other than as a student in school or college, whether for monetary compensation or not. Include the type of work, name of employer, address of employer, and the from/to date for each position or job held.

(*h*) All former addresses and dates of residence at these addresses.

(*i*) Parent's name and addresses. Indicate whether they are living or deceased.

(*j*) The religious denomination or sect of both parents.

(*k*) Was application made to the Selective Service System (Local Board) for classification as a conscientious objector prior to entry into the Armed Forces? To which local board? What decision was made by the Board if known?

(*l*) When the applicant has served less than 180 days active duty (excluding ADT and AT), a statement as to willingness to perform work under the Selective Service civilian work program for conscientious objectors, if dis-

charged as a conscientious objector. Also a statement of the applicant as to whether he consents to the issuance of an order for such work by the local Selective Service Board.

(2) *Religious training or beliefs held.*

(*a*) A description of the nature of belief which is the basis of claim.

(*b*) Explain how, when, and from whom or from what source the applicant received the training and acquired the belief which is the basis of claim.

(*c*) The name and present address of the individual upon whom the applicant relies most for guidance in matters of convictions relating to claim.

(*d*) A statement as to circumstances, if any, under which the applicant believes in the use of force.

(*e*) A description of the actions and behavior in the applicant's life which in his opinion most conspicuously demonstrates the consistency and sincerity of convictions which gave rise to claim.

(*f*) A statement as to whether applicant has ever given public expression, written or oral, to the views expressed in his application as the basis for claim. If so, specify when and where.

(3) *Participation in organizations.*

(*a*) Information as to whether applicant has ever been a member of any military organization or establishment before entering upon his present terms of service. If so, the name and address of such organization will be given together with reasons why he became a member.

(*b*) A statement as to whether applicant is a member of a religious sect or organization. If so, the statement will show the following:

1. The name of the sect, and the name and location of its governing body or head, if known.

2. When, where, and how the applicant became a member of said sect or organization.

3. The name and location of any church, congregation, or meeting which the applicant customarily attends.

4. The name, title, and present address of the pastor or leader of such church, congregation, or meeting.

5. A description of the creed or official statements, if any, and if they are known to him, of said religious sect or organization in relation to participation in war.

(*c*) A description of applicant's relationships with and activities in all organizations with which he is or has been affiliated, other than military, political, or labor organizations.

(4) *References.* Submit statements of individuals who can attest to the sincerity of applicant's professed convictions regarding participation in war. These statements will reflect the individual's full name, address, occupation or position, relationship to applicant, the length of time the individual has known the applicant, and the frequency of contact during the period.

b. The application for discharge will be submitted to the commander having custody of the member's records as outlined below.

(1) *Unit members.* ARGUS and USAR members assigned to units will submit their applications to the commanding officer of the unit to which assigned. Members of the inactive National Guard will submit their applications to commanding officer of the unit to which attached.

(2) *Nonunit members.* Ready Reserve nonunit members and Standby Reserve members will submit their applications to the oversea area commander; Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, IN 46249; or the Commanding Officer, U.S. Army Administration Center, 9700 Page Boulevard, St. Louis, MO 63132, as appropriate.

7. *Procedures. a.* Commanders having custody of the member's records will take the actions prescribed below.

(1) Immediately upon receipt of a request for discharge on the grounds of conscientious objection, the member will be fully advised and counseled concerning the provisions of section 3103 of title 38, United States Code, which provides in pertinent part that the discharge of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority, shall bar all rights (except Government insurance) of such persons under laws administered by the Veterans Administration, based upon the period of service from which discharged or dismissed. The only exception is in the cases in which it is established, to the satisfaction of the administrator, that the member was insane.

(2) After counseling, the member will be required to sign and date the following statement:

I have been counseled concerning nonentitlement to benefits administered by the Veterans' Administration due to discharge from the military service as a conscientious objector. I understand that a discharge as a conscientious objector who refuses to perform satisfactorily military duty or otherwise to comply with lawful orders of competent military authority will bar all rights based upon the period of service from which discharged under any law administered by the Veterans' Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance.

b. The commander will arrange for the applicant to be interviewed. Expenditure of funds or the use of Government transportation for applicants in connection with these actions is not authorized.

(1) Applicant will be interviewed by a military chaplain, preferably of the applicant's faith, who may be from any component of the Armed Forces. The chaplain will submit a report of interview to the commander to include comments on the sincerity of the applicant in his belief and an opinion as to the source of the applicant's belief. *A recommendation for approval or disapproval will not be included.*

(2) Applicant will be interviewed by a military medical officer, preferably one trained in and practicing psychiatry, who may be from any component of the

Armed Forces. The medical officer will submit a report of psychiatric evaluation to the commander indicating the presence or absence of any psychiatric disorder which would warrant treatment of the applicant or disposition of records through medical channels. *A recommendation for approval or disapproval will not be included.*

(3) The applicant will be afforded an opportunity to appear in person (with counsel retained by him if he desires) before an officer, other than required in (1) and (2) above, in the grade of O-3 or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters. The officer conducting the interview will permit the applicant to be heard in support of his application and he will make such other inquiries into the merits of the application as he considers appropriate. The officer conducting the interview will submit in writing his recommendations, and reasons therefor, to the commander. If the applicant waives the opportunity to be heard, his waiver will be obtained in writing and made an inclosure to the application for discharge.

(4) The commander will advise the interviewing officers of the requirements of (1), (2), and (3) above. In addition, officers conducting interviews as provided in (1) and (3) above will be furnished a copy of this regulation, application, and supporting papers.

c. Area commanders will provide assistance upon request from the Commanding Officer, U.S. Army Reserve Components Personnel Center, or Commanding Officer, U.S. Army Administration Center, as appropriate, to arrange

for necessary interviews of nonunit reservists residing in their geographical area of jurisdiction. Two copies of this regulation, application, and supporting papers will be furnished to the area commander for compliance with *b*(4) above. The Commanding Officer, U.S. Army Reserve Components Personnel Center, and Commanding Officer, U.S. Army Administration Center will be advised of the date, time, and facility where applicant should report for interview and are responsible for informing the applicant when and where to report for this purpose. Reports of interview for nonunit reservists will be mailed direct to the Commanding Officer, U.S. Army Reserve Components Personnel Center, or Commanding Officer, U.S. Army Administration Center, as appropriate.

d. DD Form 1589 (Department of Defense Summary Sheet for Review of Conscientious Objector Application) will be completed and forwarded as inclosure to application for discharge in accordance with *f* or *g* below.

e. The application for discharge, together with the inclosure(s), DD Form 1589, reports of interviews, and the officer's recommendation or waiver required by *b*(3) above will be forwarded in quadruplicate (original and three copies) in accordance with *f* or *g* below, whichever is appropriate. The members Military Personnel Records Jacket, U.S. Army (DA Form 201) will also be included.

(1) The immediate commander's comment will include the following information:

(*a*) Whether approval or disapproval is recommended and the reasons therefor.

(*b*) Date of appointment or current enlistment.

(*c*) Duty and primary MOS (enlisted personnel only).

(*d*) Whether medical board or physical evaluation board proceedings are pending or appropriate.

(*e*) Whether the member is under any type of investigation, absent without leave, or whether any flagging action has been taken in accordance with AR 600-31.

(2) Other forwarding indorsements will include recommendation for approval or disapproval and any other remarks as may be pertinent.

f. Applications submitted by ARNGUS personnel will be forwarded to the appropriate State adjutant general who will forward the case to the Chief, National Guard Bureau, Department of the Army, Washington, DC 20310.

g. Applications submitted by USAR personnel will be forwarded through military channels to the Commanding Officer, U.S. Army Reserve Components Personnel Center, ATTN: RCPA, Fort Benjamin Harrison, IN 46249.

h. The Commanding Officer, U.S. Army Reserve Components Personnel Center, will convene a board of officers to determine findings and submit recommendations on all applications for discharge submitted under this regulation. The board will follow the general procedures set forth in AR 15-6. The format of the board proceedings will be prescribed by the Commanding Office, U.S. Army Reserve Components Personnel Center.

8. Assignment. An individual who applies for discharge based on conscientious objection will be assigned duties pro-

viding the minimum conflict with his professed beliefs and will be required to maintain the same standards of performance and behavior as other personnel assigned to his unit pending a final decision on his application. This paragraph will not be applicable when subsequent applications are filed by an individual based upon substantially the same supporting information as previously submitted and disapproved by Headquarters, Department of the Army (para. 12).

a. Normally a minimum period of 90 days is required to finalize the processing of an application submitted in accordance with this regulation. The submission of an application for discharge by reason of conscientious objection subsequent to the date the individual's orders are published announcing reporting date for active duty or active duty for training is *not* a basis for delay in reporting for designated duty. In the event an individual is ordered to report to active duty or active duty for training while a request for discharge under this regulation is being processed, and the individual is advised that final action cannot be made prior to his reporting date for duty, the individual will be required to comply with his orders. In such instance, his application will be forwarded to the appropriate Active Army commander for processing.

b. An individual who is reported by his unit commander for involuntary active duty under provisions of AR 135-91 cannot subsequently tender a request for conscientious objector classification under the provisions of this regulation. Such requests will be returned by the unit commander advising the individual to submit his application at his first duty station under the provisions of AR 635-20, AR 600-200, or AR 614-106.

9. Disposition of individuals determined to be bona fide conscientious objectors. a. Discharge of personnel classified I-O. When authorized by Headquarters, Department of the Army, individuals who have been determined to be bona fide conscientious objectors with classification I-O will be discharged for the convenience of the Government in accordance with AR 135-175 or AR 135-178, whichever is appropriate. The discharge authority will insure that conscientious objection will be specifically cited in the discharge order as the supporting reason when that is the sole reason for discharge.

b. Disposition and utilization of personnel classified I-A-O. Individuals who are bona fide conscientious objectors with classification I-A-O are not eligible for discharge under this regulation. Individuals classified I-A-O will be identified by an entry on the individual's DA Form 20 (Enlisted Qualification Record) or DA Form 66 (Officer Qualification Record) as provided by AR 600-200 and AR 611-103. Such individuals will be required to complete their Ready Reserve and statutory obligation or term of enlistment subject to the assignment instructions outlined below. Individuals assigned in accordance with the provisions of (1) below will be required to sign and date in duplicate the statements as indicated below. The original will be filed in individual's Military Personnel Records Jacket, U.S. Army (DA Form 201). A signed duplicate will be forwarded to the CO, USAAC.

> I have been counseled concerning designation as a conscientious objector. Based on my deeply held moral, ethical, or religious beliefs, I consider myself to be a conscientious objector within the meaning of the statute and regulations governing conscientious objectors

and am conscientiously opposed to participation in combat training and service. I request assignment to noncombatant duties for the remainder of my term of service. I fully understand that on expiration of my current term of service, I am not eligible for voluntary enlistment, reenlistment, extension, or amendment of current enlistment, or active service in the Armed Forces.

(1) Ready Reserve members will be—

(*a*) Continued in current Reserve assignment if such assignment qualifies as noncombatant service and training;

(*b*) Assigned to an appropriate vacancy in a Reserve medical unit, if available; or

(*c*) Assigned to an annual training or reinforcement control group, whichever is appropriate, under criteria prescribed in AR 140-10.

(2) Standby Reserve members will be continued in current assignment.

(3) ARNGUS members who, upon separation from their State status as Army National Guard and/or upon withdrawal of Federal recognition, revert to USAR status will be assigned in accordance with (1) (*b*) or (*c*) above.

10. Disapproved requests. Upon determination that neither I-O or I-A-O classification is appropriate, the individual requesting discharge will be advised by his commanding officer that his request has been denied, giving reasons for such denial.

11. Unsatisfactory participation. Any member reassigned to noncombatant duties or retained in his normal duty as-

signment, who demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, will be subject to appropriate disciplinary action the same as any other Reserve member of the Army.

12. When second and subsequent applications are submitted. Area commanders; Commanding Officer, U.S. Army Reserve Components Personnel Center; Commanding Officer, U.S. Army Administration Center; or the State adjutant general, as appropriate, are authorized to return to an applicant, without action, any second and subsequent application for discharge under this regulation when review reveals that it is substantially the same as a previous application disapproved by Headquarters, Department of of the Army.

13. Removal of identification as conscientious objector. When an individual who, under paragraph 9*b* has been determined to be a bona fide conscientious objector, desires to have identification as a conscientious objector removed, the following procedures will apply:

a. He will submit his request to his commanding officer, using DA Form 2496 (Disposition Form) or letter, prepared in four copies and all copies will be signed. If applicable, the request will contain the individual's Selective Service Number, local board number, and address.

b. The custodian of his records will then delete the conscientious objector entry on the individual's DA Form 66 or DA Form 20, whichever is appropriate. Action will also be taken to delete this identification from any data processing records on which the classification may be coded. The

custodian will indicate by comment on all copies of the DA Form 2496 when the entry on the DA Form 66 or DA Form 20 has been deleted and distribute the copies as follows:

(1) Original to be filed as a permanent document in the individual's Military Personnel Records Jacket, U.S. Army.

(2) Copy to be forwarded through channels to the appropriate State adjutant general or Commanding Officer, U.S. Army Administration Center.

(3) Copy to be forwarded to the appropriate State Director, Selective Service System. See AR 601-49 for Selective Service System addresses.

(4) Copy to be returned to the individual concerned.

c. The custodian of the Military Personnel Records Jacket or Official Military Personnel File, as appropriate, will remove and destroy the statement required by paragraph 9*b*.